HodgsonRuss LLP ATTORNEYS

S. Robert Schrager
Direct Dial: 212.584.9416
RSchrage@hodgsonruss.com

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BY ECF

Hon. Joan M. Azrack
United States Magistrate Judge
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ***Wetzelberger v. M&T Bank, et al.*****, 12-cv-03685-BMC-JMA**

Dear Judge Azrack:

We are the attorneys for respondent M&T Bank (incorrectly named herein as “M&T Bank Corporation”). By Order dated July 30, 2012, this case was referred to you by Judge Cogan for all pre-trial purposes.

Pursuant to Rule IV(B) of Your Honor’s Individual Rules, respondent M&T Bank requests a pre-motion conference be scheduled because it is M&T Bank’s intention to move to dismiss this matter. Petitioner has failed to state any grounds that would entitle him to pre-action disclosure and his claims are precluded on the grounds of collateral estoppel, res judicata and forum non conveniens.

This is a proceeding commenced by the Petitioner, Todd Wetzelberger seeking pre-action discovery “to preserve information and to aid in bringing an action.” As set forth in Mr. Wetzelberger’s petition, the expected action will involve fraud, deception, violation of various statutes, including the Patriot Act, and conversion and other torts. Petition ¶ 4. The underlying subject matter of the action arises from Maryland foreclosure proceedings involving real property located in that state.

Background Facts

On December 22, 2006, Petitioner and his wife borrowed $496,000 from M&T Mortgage Corporation ("M&T Mortgage"). The mortgage loan was secured by their residence at 1926 Wilson Point Road, Middle River, Maryland ("the Property").

When the Petitioner and his wife defaulted on the mortgage loan, M&T Mortgage initiated foreclosure proceedings through its Substitute Trustees Mark S. Devan, Kristin K. Haskins, and Individual Respondents herein Sharon P. Menapace, Thomas P. Dore, and Gerard F. Miles, Jr. On March 31, 2010, the Property was sold to M&T at a foreclosure sale.

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Following the foreclosure sale the Petitioner commenced numerous proceedings. First, Petitioner filed what was captioned a "Notice of Motion to and Motion for Declaratory Judgment Motion to Vacate Void Non-judicial Foreclosure Sale Due to Prior Administrative Res Judicata, Due to Fraud." A hearing was held in the Circuit Court for Baltimore County during which the Court took testimony and heard argument concerning Petitioner's various claims. After considering the arguments advanced by the Petitioner and the evidence presented at the hearing, the Court found that Petitioner's contentions had no merit.

After that, on February 4, 2011, Petitioner filed a motion to show cause, asserting the same claims that the Circuit Court rejected in its September 27 Order. The Circuit Court denied the Motion to Show Cause and Petitioner filed a Notice of Objection on March 1, 2011, protesting the Court's denial of Petitioner's Motion to Show Cause and advancing the same baseless arguments for a third time. Two days later, and before the Circuit Court had an opportunity to rule on Petitioner's Notice of Objection, Petitioner filed a Motion to Reconsider the Motion to Show Cause, raising precisely the same arguments for a fourth time. Consistent with its prior rulings, the Circuit Court rejected all of Petitioner's contentions and denied the Motion to Reconsider.

Petitioner appealed the Order of Ratification on March 15, 2011. Petitioner's appeal is currently pending before the Court of Special Appeals of Maryland.

Notwithstanding the pending appeal, Petitioner filed a Verified Complaint, which was effectively a counterclaim and a third-party complaint against M&T and the Individual Respondents. The Verified Complaint set forth a rambling pleading asserting Petitioner's claims for (1) an Emergency Temporary Restraining Order and Preliminary Injunctive Relief; (2) Fraud; (3) Abuse of Process; (4) Conversion; (5) Wrongful Foreclosure; (6) To Set Aside Trustee Sale; (7) Cancellation of Trustee's Deed; (8) Imposition of Constructive Trust; (9) Accounting; and (10) Trespass. That Verified Complaint was dismissed, with prejudice, by the Circuit Court for Baltimore County on December 2, 2011.

Grounds for the Motion to Dismiss

Petitioner's latest filing is the instant petition seeking pre-action disclosure. In his petition, the Petitioner states that the subject matter of the expected action involves (i) the deception in inducing Petitioner to enter into an undisclosed investment contract; (ii) fraudulent and illegal use of MERS (the Mortgage Electronic Recording System) in connection with said investment contract; (iii) Respondents' breach of Petitioner's statutorily protected rights, including the Real Estate Settlement Procedures Act; (iv) willful violation of unfair business practices statutes, by, among other things, processing money from unknown sources, in contravention of the Patriot Act; (v) accepting money, transferring alleged assets and foreclosing upon alleged assets in instances where the alleged assets do not exist, and in which the Respondents have no right, title, or interest upon which they can act; and (vi) Respondents' continuing conversion and other tortuous conduct intended to deprive Petitioner of Petitioner's money, property (real, personal, tangible and intangible) and legal rights and remedies for the foregoing acts.

Disclosure before an action is commenced is limited "to aid in bringing an action, to preserve information or to aid arbitration." N.Y.C.P.L.R. §3102(c). It is submitted that none of these are applicable here. Moreover, an application for pre-action disclosure requires proof of a meritorious cause of action. "A petition for pre-action discovery should only be granted when the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." *Holzman v. Manhattan & Bronx Surface Transit Operating Auth.*, 271 A.D.2d 346, 347, 707 N.Y.S.2d 159, 161 (1st Dep't 2000).

As is clear from the litany of proceedings involving the Petitioner and his claims, Petitioner does not have a meritorious claim since the judgments of the Maryland courts dismissing Petitioner's claims in those courts preclude him from bringing, once again, those same claims in New York. Moreover, even were Petitioner's claims not precluded from being re-litigated, it is submitted that these claims should be brought in the location of the real property and the foreclosure proceedings, to wit, Maryland.

This is not an arbitral matter. There is no basis for the argument that preservation of evidence is required. "The relief requested by the plaintiff is extraordinary and she must, therefore, bear the heavy burden of demonstrating not only its propriety but its necessity." *Ludwig v. Ludwig*, 94 Misc.2d 880, 405 N.Y.S.2d 897 (N.Y. Sup. Ct. 1978). Finally, given the multiple proceedings already commenced by the Petitioner and the numerous allegations (baseless though they may be) contained in the Petition, the Petitioner has no need of discovery to frame a complaint.

Accordingly, as pre-claim discovery may not be used for the purpose of permitting the claimant to ascertain whether facts supporting a cause of action actually exist, *Edens v. State*, 259 A.D.2d 729, 730, 687 N.Y.S.2d 423, 425 (2d Dep't 1999), it is submitted that this proceeding should be dismissed.

Respectfully submitted,

s/S. Robert Schrager

S. Robert Schrager

cc. Todd Wetzelberger
Petitioner pro se (by mail)